LUND LAW, PLLC
Attorneys At Law

502 South 19th Ave., Ste. 306
Bozeman, Montana 59718
Direct: 406.586.6254
Fax: 406.586.6259

December 6, 2012

Via Hand Delivery

Melissa Hornbein
Montana Reserved Water Rights Compact Commission
1625 Eleventh Ave.
PO Box 201601
Helena, MT 59620-1601
mhornbein@mt.gov

RE: Eastern Montana Concerned Citizens and Counties' Response to Commission's CMR Draft Water Rights Compact

Dear Ms. Hornbein:

My clients have met and discussed the Commission's Counter-Proposal, which has now been embodied in the CMR Draft Water Rights Compact ("Draft Compact"). Based on our initial analysis of the Draft Compact, it appears that the document may effectively operate as a closure of the basin. Further, and even more troubling, is the extent to which the Commission has stepped beyond the bounds of Montana water law and the Commission's legislative authority.

Section 85-2-701, MCA, provides a clear statement of the legislative intent behind the authorization of compact negotiations by the Commission:

> Because the water and water rights within each water division are interrelated, *it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act*. It is the intent of the legislature that the unified proceedings include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. However, it is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state.

Mont. Code Ann. § 85-2-701(1) (emphasis added).

The McCarran Amendment authorizes the waiver of the United States' sovereign immunity in order to join the United States in state water adjudications. Specifically, the McCarran Amendment provides:

> The United States, when a party to any such suit, shall (1) be deemed to have *waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty*...

43 U.S.C. § 666(a) (emphasis added).

Finally, the provisions of § 85-2-701, MCA, and 43 U.S.C. § 666, are read in conjunction with § 85-2-228, MCA, which states:

> (3) At the request of a federal agency, the reserved water rights compact commission *may negotiate to conclude a compact under Title 85, chapter 2, part 7*, for a federal reserved water right with a priority date of July 1, 1973, or later.

Mont. Code Ann. § 85-2-228(3) (emphasis added).

Nothing in the laws providing for the conclusion of a federal reserved water rights compact allows, authorizes, or otherwise sanctions the Commission acting beyond the bounds of the Montana Water Use Act. Further, and pursuant to Article IX of the Montana Constitution, the legislature has affirmatively declared that "any use of water is a public use and that the waters within the state are the property of the state for the use of its people and *are subject to appropriation for beneficial uses as provided in [Title 85, chapter 2]*." Mont. Code Ann. § 85-2-101(1) (emphasis added).

In general, and as my clients have repeatedly expressed to the Commission throughout the negotiation of this Draft Compact, my clients are concerned about the parts of the Draft Compact that would expand Montana water law beyond legislative directive or historic uses. My clients support the Commission negotiating a resolution that is within these confines. However, my clients cannot support the extreme overreach of authority the Commission is exercising under the current terms of the Draft Compact. Specifically, we raise the following problems with the Draft Compact:

Article I. – The Fourth "Whereas" Clause:

In prior, non-Indian reserved water rights compacts negotiated by the Commission, there has not been an additional statement or illustration of the purposes of the reservation in the "Whereas" clauses like the one included in the Draft Compact. *See for example* Mont. Code Ann. §§ 85-20-401, 85-20-701, 85-20-801, 85-20-1101, 85-20-1201, 85-20-1301, 85-20-1601. Here, the Commission includes that the reservation of the CMR was done under a "multiple use mandate," which my clients find is a characterization subject to interpretation and not fully supported by Executive Order 7509. Any statement expounding upon the purpose of the reservation should be struck

from this "Whereas" clause, with the clause ending with a period after "Fort Peck Game Range."

Article II. Definitions:

There are several definitions in the Draft Compact that do not comport with Montana water law and/ or lend confusion to elements of the Draft Compact.

"Concurrent":

How does the concept of this word differ from the concept of supplemental water rights? The Administrative Rules of Montana for the DNRC's Water Rights Bureau defines supplemental irrigation as "additional water provided to lands which are already irrigated or to lands which will receive water through another right." A.R.M. 36.12.1010. Supplemental and Overlapping Point of Use water rights occur when a claimed place of use of a water right overlaps the claimed place of use on another water right having the same purpose and belonging to the same owner. Rule 40a, Mont. Water Right Claim Examination Rules.

The Draft Compact's definition of "concurrent" gives rise to the question of how the compact's "concurrent" water rights will be handled when the DNRC evaluates new water right applications and change applications. For any subsequent new appropriations or change applications, the definition of "concurrent" impacts how those water rights applications would have to address legal availability and adverse affect under §§ 85-2-311 and 85-2-402. Will "concurrent" be considered additive to the State's existing 70 cfs on the Musselshell River in the legal availability listing of water right claims in the area? Will it be ignored?

Finally, will this new "concurrent" right be able to claim injury? If so, over and above the State's 70 cfs instream flow? That is, will change and new applicants have to ensure 70 cfs is in the system or will 140 cfs have to be present in order to not have an adverse affect?

"Instream Flow":

The Draft Compact defines "instream flow" as waters that shall remain in the stream "for the purposes of the federal reservation." Article II (10). However, Montana law typically defines "instream flow" as water left in a stream for nonconsumptive uses such as preservation of fish or wildlife habitat. Water Rights in Montana at 59 (April 2012); *see also* Mont. Code Ann. §§ 85-2-408 and 85-2-436. The Commission's definition attempts to stretch the bounds of existing Montana water law by expanding instream flow rights to accommodate the United States' and the Commission's vision of the CMR's purpose. However, as Executive Order 7509 makes clear, the purpose of the reservation is "for the protection and improvement of public grazing lands and natural forage resources" with the natural forage resources being first managed for the "purpose of sustaining in a healthy condition a maximum of four hundred thousand (400,000) sharptail grouse, and one thousand five hundred (1,500) antelope, the primary species, and such nonpredatory secondary species in such numbers as may be necessary to maintain a balanced wildlife population." Thus, any need for instream flows by the United States must be limited to the purpose of the reservation, which may allow for some flow to maintain wildlife habitat, but only insofar as it relates to sustaining a

maximum population of 400,000 sharptail grouse and 1,500 antelope. There is absolutely no precedent in Executive Order 7509 that would permit the Commission to provide the broad "instream flow" definition that it has currently put forward in the Draft Compact.

"Protected Reach":

This definition is overly broad in scope, imposes obligations not recognized under Montana law, and appears to be an overreach of the Commission's legislative grant of authority.

The definition, as currently written in the Draft Compact, would designate hundreds of miles of streams, and their flow, as "protected" reaches. Furthermore, the definition is directly tied to the Commission's extralegal limits on impoundments, with which my clients ardently disagree. *See* our comments below regarding the Article II definition of "stacked" and Article III.F. While my clients do not dispute that there is some authority under Montana water law to designate protected reaches (*see* §§ 85-2-408 and 85-2-436, MCA), the extent to which the Commission is trying to impose this definition is far too broad. Further, the Commission cannot tie this definition to its prohibitions on impoundments, as those prohibitions are beyond the authority the Commission can exercise in a negotiating a compact.

"Stacked":

This definition does not appear to be a definition recognized under Montana water law and also appears to be an overreach of the Commission's legislative grant of authority.

My clients do not support placing limits on construction on areas outside of the CMR. Further, we believe that such restriction would be a taking of private property and outside the jurisdiction of the Commission. My clients believe that any on-stream impoundments should be governed by current Montana law and that the Compact Commission does not have the legal authority to modify that law for those who lie outside of the CMR.

"Wildlife Habitat":

Though the title of this definition has been changed, it is still an attempt to grant a "riparian" right, which is not recognized under Montana water law. Further, the definition is still not acceptable because it is extremely broad and is not a recognized definition under Montana water law.

Article III. Water Right:

A. Priority Date:

My clients propose the following edits (underlined/ ~~struck~~) to the priority date language in the Draft Compact:

> The Reserved Right for stock and wildlife~~, and wildlife habitat~~ uses within the Charles M. Russell NWR that are described herein have a priority date of December 11, 1936. The United States agrees to subordinate its 1936 water rights to water rights Recognized Under State Law existing on the

Effective Date of this Compact. Accordingly, any water right Recognized Under State Law with a priority date prior to the Effective Date of this Compact is functionally senior in priority to any component of the Reserved Right, including any unquantified right component, and is not subject to a call for enforcement or administration by the United States in the exercise of the Reserved Right. The final decree for the United States' Reserved Right shall include the above prohibition on call.

In regard to the language appearing in ~~strikethrough~~, as stated above, "wildlife habitat" is not a recognized water use under Montana water law. In regard to the language in double underline, the Commission has proposed granting the United States an unquantified water right. Should that occur, my clients would want specific language that makes it clear the United States could never make a call for its "unquantified" right. If the Commission ultimately decides not to give the United States an unquantified right, the language appearing in double underline could be removed.

B. Quantified Instream Rights:

My clients are still very concerned about the Commission's "quantification" of the Reserved Right. The Commission's approach to granting these rights raises several concerns:

1) Is the water physically and legally available for these appropriations?
2) What is the biological need for these rights?
3) Is this a beneficial use of water?
4) The period of use has been expanded. The Draft Compact's period of use from March 1 to June 30 essentially means ALL water in the system, as realistically none of these tributaries have natural flow water available after June 30. This expansion of the period of use appears to effectively operate as a bar to any new appropriations after the compacts is ratified.
5) By changing the right from measurement at a point (say intersection with Fort Peck Lake) to the whole stretch (from boundary of reserve down to Fort Peck Lake) this drastically will increase the flow rates and volumes of water needed to meet the 0.5 or 1.0 cfs requirements. If there are streams that have losing stretches, there may be a need for 5-10 cfs at the upstream point to provide 1 cfs in the downstream stretch. Thus, although the right is limited to 0.5 or 1 cfs, the ability to appropriate new water would be limited, through adverse affect analysis, to the right's flow rate PLUS all the carriage water necessary to achieve the reserved flow rates.

C. Instream Flow Right on Musselshell River:

As my clients have previously indicated to the Commission, my clients do not support the Compact Commission granting the CMR an additional/ "concurrent" instream flow right in the Musselshell River. *See also* the discussion above on the Article II Definition of "Concurrent."

D. Wells, Ponds and Springs:

My clients' major concern about quantifying these water rights is that neither the Compact Commission nor the USFWS has provided any information indicating how this quantity of water relates to the water that is actually available.

My clients find that just pulling a number out of the air for negotiation purposes seems to be irresponsible and, again, leaves them without sufficient knowledge on how this proposal would impact the available water budget on an ongoing basis. It is possible, that if my clients understand the numbers behind this proposal better, they may be more comfortable with this part of the proposal.

Further, the issuance of these rights as reserved permits skirting around the Water Court's review of the existing state-based claims – a process where the United States would otherwise have to "prove up" the right before getting to keep it. In the Water Court, it is very likely that not all of these rights would be decreed due to abandonment, over-claiming, etc. However, under the Draft Compact, the United States simply gets the right – without having to provide any proof of its existence – subject to never being able to be abandoned, under Article V.C. Essentially, the Draft Compact has created new rights, gives these rights rules that are separate and apart from Montana law, but then goes on to state under Article V.B. that these rights will still enjoy the benefits of existing state law, including the ability to object in Water Court proceedings.

E. Unquantified Right:

My clients continue to be unsupportive of the Commission's granting the CMR an unquantified right. As a practical matter, the wildlife will, as they always do, drink from whatever source of water is available. This raises the important question of what is the point of granting this right. Will this right be included in the DNRC's water rights database?

The Draft Compact does not provide a defined term for "unquantified right" and, again, even if the Commission were to define the term, the definition does not appear to be a definition recognized under Montana water law. Further, the granting of a previously unrecognized "right" appears to be another overreach of the Commission's legislative grant of authority. If the United States and the Commission insist upon an unquantified right in the Compact, my clients want language which clearly defines the parameters of the right and makes it is clear that the CMR can never make a call on these rights. Please also see our comments, above, regarding Article III.A.

F. Conditions to be applied to permits issued after the Effective Date of the Compact:

This provision of the Draft Compact is also another example of the Commission acting far in excess of its legislative grant of authority. First of all, my clients do not support placing limits on construction on areas outside of the CMR. Further, we believe that such restriction would be a taking of private property and outside the jurisdiction of the Commission. Second, my clients believe that any on-stream impoundments should be governed by current Montana law and those agencies charged with carrying out the laws – namely, the DNRC. The Commission simply does not have the legal authority to modify that law for those who lie outside of the CMR and it cannot step into the shoes of the DNRC absent a specific legislative or statutory grant of authority to do so, which is not present here.

Article IV. Compact Implementation:

A. Quantified Reaches:

As stated above, it appears that the Draft Compact will effectively operate as a basin closure. The availability of water for future development is functionally non-existent based upon the difficulties the Reserved Right, as currently quantified in the Draft Compact, will pose for anyone looking to apply for a new right or attempt to change an existing right. *See* our comments regarding Article II (Definition of "concurrent") and Article III, sections A - E, above. Also, and as discussed above in regard to Article III.B., by changing the right from measurement at a point to the whole stretch, this will drastically increase the flow rates and volumes of water needed to meet the 0.5 or 1.0 cfs requirements. Thus, although the right is limited, the ability to appropriate new water would be even more limited, if not completely foreclosed.

B. Musselshell River:

As my clients have previously indicated to the Commission, and above in these comments, my clients do not support the Compact Commission granting the CMR an additional/ "concurrent" instream flow right in the Musselshell River. *See also* the discussion above on the Article II Definition of "Concurrent."

Further, the Draft Compact purports to impose permitting conditions which are otherwise not sanctioned by Montana law. The permitting process is already provided for in current Montana law and those agencies charged with carrying out the laws – namely, the DNRC, are the proper parties to determine when conditions will or will not be placed on a permit. The Commission simply does not have the legal authority to modify that law and it cannot step into the shoes of the DNRC absent a specific legislative or statutory grant of authority to do so.

C. Conditions to be applied to permits issued after the Effective Date of the Compact:

Again, and as discussed immediately above in relation to Article IV.B., the Draft Compact purports to impose permitting conditions which are otherwise not sanctioned by Montana law. The permitting process is already provided for in current Montana law and those agencies charged with carrying out the laws – namely, the DNRC, are the proper parties to determine when conditions will or will not be placed on a permit. The Commission simply does not have the legal authority to modify that law and it cannot step into the shoes of the DNRC, absent a specific legislative or statutory grant of authority to do so. Further, and as discussed above in relation to the definition of "Stacked," my clients do not support placing limits on construction on areas outside of the CMR and believe that such restriction would be a taking of private property and outside the jurisdiction of the Commission.

D. Uses exempted from curtailment by the United States' exercise of the Reserved Water Right during times of shortage:

The inclusion of some already exempt from call water rights, but not all exempt from call water rights in this section is confusing, as well as troubling. Basic rules of contract construction would dictate that anything excluded from the list would be subject to call, even if those rights are not subject to call pursuant to existing Montana

water law. Again, this section of the Draft Compact appears to be another clear and distinct overreach of the powers granted to the Commission by the legislature and not in accord with existing law. Further, it is unclear why the Commission has chosen these particular rights to exclude from call, but not others. Some understanding of the reasoning behind the Commission's drafting choices in this provision would be helpful to my clients and their understanding of the Draft Compact.

Article V. General Provisions:

D. Concurrent with other Non-Consumptive Instream Water Uses:

Again, please refer to our comments, above, regarding Article II (definition of "concurrent") and Article IV.B. Additionally, this provision of the Draft Compact seems to further define the already defined term of "concurrent." My clients request that the Commission tighten this language and make it clear by what it intends in granting a "concurrent" water right. Some understanding of the reasoning of the Commission's drafting choices in this provision would be helpful to my clients and their overall understanding of the Draft Compact.

The above are initial impressions and analysis of the Draft Compact. Considering the short time period my clients and my office had to review the Draft Compact, we will likely have further analysis and feedback for the Commission. However, we hope the Commission will take the above into serious consideration as the negotiations continue in the meantime.

Sincerely,

Hertha L. Lund
LUND LAW, PLLC
Lund@Lund-Law.com